

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSHUA T. DIRKS)	
Claimant)	
VS.)	
)	Docket No. 1,033,903
WARREN DRILLING)	
Respondent)	
AND)	
)	
COMMERCE & INDUSTRY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the June 4, 2007, preliminary hearing Order for Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

On February 12, 2007, claimant fractured his left little finger working on one of respondent's drilling platforms when a pipe rolled from a table and crushed his left hand. Respondent, at this time, does not challenge that claimant's accident arose out of and in the course of his employment. But respondent does contend claimant was impaired by drugs at the time of the accident and that such impairment contributed to his accident.

In the June 4, 2007, Order for Compensation, Judge Fuller awarded claimant some temporary total disability benefits and ordered his medical bills paid. The Judge specifically found respondent failed to prove there was probable cause to believe claimant had used, possessed, or was impaired by drugs immediately before the accident.

Respondent contends Judge Fuller erred because it was not required to prove probable cause due to the company's policy requiring drug tests. Consequently, respondent argues the results from the drug tests it introduced at the preliminary hearing create a presumption that claimant was impaired. Moreover, respondent argues the testimony from Clark Elliott, respondent's safety compliance official, establishes that claimant's impairment contributed to his accident. In short, respondent asks the Board to

reverse the preliminary hearing Order and to deny claimant's request for workers compensation benefits.

Claimant did not file a brief with the Board and, therefore, the Board must decide this appeal without the benefit of claimant's analysis.

The only issue before the Board is whether claimant should be denied workers compensation benefits because drug consumption allegedly contributed to his accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering respondent's arguments, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Respondent hired claimant to work as a floor hand on one of its drilling crews. Claimant reported to work at 3:00 p.m. on February 12, 2007, which was the first and only day that claimant worked for respondent. Claimant's job at the drilling site that day was to roll casing (oil field pipe) off a table onto a catwalk before hooking a chain to the casing so it could be lifted up and placed into a hole. At approximately 10:00 p.m., after working for seven hours and handling approximately 160 other sections of casing, a heavy 60-foot section of 5½-inch casing rolled off a table before claimant was ready for it and crushed his left hand.

Respondent contends claimant should not receive workers compensation benefits for this accident as claimant was allegedly impaired at the time of the accident and such impairment contributed to the accident. Respondent asserts it is relieved of all liability for this accident by reason of K.S.A. 2006 Supp. 44-501, which reads, in part:

(d)(2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. . . . It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

. . . .

An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

(3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:

(A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

. . . .

(C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be

evidence that the presumed impairment contributed to the accident as required by this section. . . . (Emphasis added.)

At the preliminary hearing, respondent introduced the results from drug tests, which the Judge admitted for purposes of preliminary hearing. Nonetheless, in the preliminary hearing Order the Judge commented upon whether respondent had established probable cause of impairment or drug use immediately before the accident. It is unclear whether the existence of probable cause was important to the Judge for purposes of admitting the results from the drug tests (which she had already done¹) or whether the Judge believed probable cause was a prerequisite to finding the alleged drug use contributed to the accident. For purposes of this appeal, however, the distinction is not important.

Suffice it to say, there are questions whether the results from the drug tests are admissible and even questions whether respondent's written drug test policy relieves respondent from proving probable cause of impairment or drug use. But we do not reach those issues as the manner in which claimant's accident occurred makes it unlikely that drug use was a contributing factor.

Claimant had worked on the drilling rig in close proximity of others for seven hours before the accident occurred. There is no testimony from the others on the drilling crew that claimant was impaired. The accident occurred while claimant was looking away from casings as he was looking back towards the drilling rig awaiting the chain that he was using to move the pipes. Claimant was inexperienced, the pipe was heavy, and the accident was sudden and occurred without warning. Based on this record, this Board Member does not find a contribution between the accident and alleged drug use. For these reasons, the preliminary hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

The parties introduced many documents that have little, if any, evidentiary value regarding the matters in issue. The parties are reminded and encouraged to introduce only those records that are material to the issues. To do otherwise unnecessarily burdens the record and unnecessarily increases the costs of litigation.

¹ P.H. Trans. at 26.

² K.S.A. 44-534a.

WHEREFORE, this Board Member affirms the June 4, 2007, Order for Compensation entered by Judge Fuller.

IT IS SO ORDERED.

Dated this _____ day of August, 2007.

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge